

# In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER  
COMPANY, a corporation,  
Plaintiff in Error,  
vs.

MABEL SIMPSON and WAYNE  
DEAN SIMPSON, EARL SIMP-  
SON and JOYCE SIMPSON, minors,  
by MABEL SIMPSON, their guar-  
dian *ad litem*,  
Defendants in Error.

## BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the  
United States for the District of Oregon.

Names and addresses of the Attorneys of Rec-  
ord:

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<p>OREGON-AMERICAN LUMBER COMPANY, a corporation, Plaintiff in Error, vs. MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMP- SON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guar- dian <i>ad litem</i>, Defendants in Error.</p>
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## STATEMENT OF FACTS.

On the 11th day of September, 1924, Clyde C. Simpson, while employed by the defendant in its lumber mill at Vernonia, Oregon, was struck by a piece of lumber which was kicked back from one of the edgers. Medical attention was promptly given but the wound became infected and as a result thereof Simpson died on October 29, 1924.

The present action was instituted by Simpson's widow and children as plaintiffs to recover damages for his death under the provisions of the Employers' Liability Law of the State of Oregon, sections 6785 to 6790 inclusive, Oregon Laws. Under the provisions of section 6788,

Oregon Laws, as amended by the Laws of 1921, page 38, the cause of action for death resulting from the violation of any of the duties imposed upon employers by the Employers' Liability Law vests in the widow and children. Section 6788 further provides that the amount of damages recoverable in such an action is unlimited. Section 380, Oregon Laws, provides that the right of action for death resulting from negligence other than a violation of duties enjoined by the Employers' Liability Law vests in the administrator and recovery of damages is limited to \$7,500.00. Section 380, Oregon Laws, was enacted in 1862 and has stood upon the statute books since that time unmodified with the exception that in 1907 the amount of damages which the original enactment limited to \$5,000.00 was increased to \$7,500.00. The Employers' Liability Law of Oregon was first enacted in 1911.

The negligence charged against the defendant in the amended complaint is contained in the allegations of paragraphs V and VI, which are as follows :

#### V.

“That in and about its said mill the defendant lumber company employed a certain system of live rolls used for the purpose of conveying lumber from one part of its plant to another, and a certain machine known as a gang edger which consisted of a set of saws operated on a common drum or arbor, each saw being about thirty inches in

diameter and about three-eighths of an inch thick, and said saws were so arranged that when large pieces of lumber were propelled against the same, said pieces would be cut at the same time by several of said saws, thereby dividing such lumber into several pieces; for the purpose of driving the lumber against said saws there were in connection with said machine certain live rolls which were caused to revolve by gears driven by steam power, *and the lumber to be cut by said saws was put upon said live rolls and thereupon a set of rolls not operated by gears, known as dead rolls, were lowered upon such lumber to hold the same firmly in position so that said live rolls could drive the same against said saws in a direct course; that said dead rolls were held down upon such lumber by a weight of about five hundred pounds, and said machine was equipped with an arrangement of steam operated cylinders and pistons into which steam was admitted by means of valves for the purpose of lifting said dead rolls from said lumber when necessary to admit pieces of lumber into said machine; said edger saws were driven at the rate of about 1800 to 2000 revolutions per minute, and were propelled with such terrific force that in the event lumber was permitted to be driven against the same in an irregular or uneven course, or to shift from side to side while being driven against the same, there was*

great and imminent danger that such lumber would bind upon said saws and would thereupon be thrown by said saws to different points in and about said mill, with great danger to the employes engaged in said mill, *and it was therefore necessary that the valves admitting steam into the cylinders operating said pistons be so adjusted that the same would admit steam into said pistons promptly for the raising of said dead rolls and that when required to do so by the operator of said edger, would release the steam in said cylinders promptly and completely so as to permit the full force of the weight of said deal rolls to bear upon the lumber being sawed by said edger, so that the same might be held firmly in place and projected against said saws in an even course, and not permitted to change the course at which it started against said saws.*"

## VI.

"That on and prior to said 11th day of September, 1924, said defendant had carelessly and negligently and in violation of Section 6785, Oregon Laws, *permitted said edger and said device for lifting said dead rolls to be out of repair and in a dangerous condition in this: that the valves admitting and releasing the steam into said cylinders for the purpose of operating said pistons to lift said dead rolls had been permitted to be*



*and remain in such condition through some defect in the adjustment thereof which plaintiffs cannot particularly specify, but with which defendant is well acquainted, so that the same would not open and close freely, and that when the steam had been admitted into said cylinders and said rolls had been lifted, and the said valves were released for the purpose of permitting said rolls to drop upon lumber being cut in said edger, the said valves would not promptly release the steam from said pistons and said rolls were thereby kept partially or completely lifted and were prevented from descending on said lumber with sufficient force to hold the same firmly in position, and cause the same to be driven against said saws in a straight course, and such lumber was by reason thereof apt to stop while being driven against said saws and to bind upon said saws and to be thrown thereby with great force to other parts of said mill."*

The original complaint filed in the present action embodied an additional charge of negligence which was set out in paragraph IX thereof in the following language: "and thereupon the operator of said gang edger, who was an employe of defendant, carelessly and negligently repeatedly lifted the said dead rolls and dropped the same and released the pressure upon said lumber and permitted the same to be loose upon said power driven lower rolls."

A motion was filed by the plaintiff in error to strike out the above allegation upon the ground that the same "consists of common law negligence, for which no right of action exists in favor of the surviving widow and children." This motion was granted by the court below (Judge Wolverton sitting), and thereupon the plaintiffs filed their amended complaint, which omitted such allegation.

Upon the close of the evidence the plaintiff in error interposed a motion for a directed verdict in its favor. This motion was denied by the court below and the cause was submitted to the jury. From a judgment entered in favor of the defendants in error for \$15,000 the present writ of error is prosecuted.

### **Specification of Errors**

The plaintiff in error has assigned as error, the action of the District Court of the United States for the District of Oregon in denying and overruling the motion of the plaintiff in error for a directed verdict in its favor, which motion was as follows:

"At this time the defendant moves the court for an order directing a verdict in favor of the defendant and against the plaintiff, upon the following grounds: first, that the plaintiffs have not offered any evidence tending to establish any of the charges of negligence alleged in the complaint. Sec-

ond, that the plaintiffs have not proven their case sufficient to be submitted to the jury. Third, that the plaintiffs have not offered any evidence tending to prove or establishing that the negligence alleged in the complaint was the direct and proximate cause of the injury to Claud Clyde Simpson, the deceased."

### Brief of Argument

1. Plaintiffs can recover only upon the negligence charged in their amended complaint. This is the rule asserted in cases involving common law negligence.

Woodward v. O. R. & N. Co., 18 Or. 289, 293.

Knahtla v. O. S. L. Ry. Co., 21 Or. 136, 142.

Kincaid v. O. S. L. Ry. Co., 22 Or. 35, 39.

Lieuallen v. Mosgrove, 33 Or. 282, 286.

Sullivan v. Wakefield, 59 Or. 401, 407.

Holmberg v. Jacobs, 77 Or. 246.

Bamford v. Van Emon Elevator Co., 79 Or. 395.

(a) The same rule has been enforced in actions brought under the provisions of the Employers' Liability Law of Oregon, Sections 6785-6790, inclusive.

Dorn v. Clarke-Woodward Drug Co., 65  
Or. 516, 520.

Schaller v. Pacific Brick Co., 70 Or. 557,  
568.

Heiser v. Shasta Water Co., 71 Or. 566,  
571.

McClagherty v. Rogue River Elec. Co.,  
73 Or. 135, 147.

Land v. Camden Iron Works, 77 Or. 137,  
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Wolsiffer v. Bechill, 76 Or. 516, 526.

Camenzind v. Freeland Furniture Co., 89  
Or. 158, 181.

Rorvik v. North Pacific Lumber Co., 99  
Or. 58.

2. The proof offered by the plaintiffs must establish that the negligence charged in their amended complaint was the proximate cause of the injury.

Chambers v. Everding & Farrell (1914),  
71 Or. 521, 531.

Knauff v. Highland Development Co.,  
(1913), 68 Or. 93, 95.

Buchanan v. Lewis A. Hicks Co., (1913),  
66 Or. 503, 507.

Brown v. O.-W. R. & N. Co., (1912), 63  
Or. 396.

(a) The foregoing rule is enforced with respect to actions instituted under the Employers' Liability Law of Oregon.

Vanderflute v. Portland Ry., Light & Power Co., (1922), 103 Or. 398, 404.

3. A cause of action for death not resulting from violation of Employers' Liability Law vests in the personal representative of the deceased.

Section 380, Oregon Laws.

Graham v. Bowman-Hicks Lumber Co.,  
Decided by District Court of the United States for the District of Oregon (unreported).

4. The jury cannot speculate as to the cause of the injury and where the evidence is such that the jury is left to speculation as to the cause of the damage or injury complained of, plaintiffs cannot recover.

Holmberg v. Jacobs, (1915), 77 Or. 246-253.

Spain v. Oregon-Washington R. & N. Co., (1915), 78 Or. 355-369.

Medsker v. Portland Ry., Light & Power Co., (1916), 81 Or. 63-69.

Bridenstine v. Gerlinger Motor Car Co., (1917), 86 Or. 411-426.

Stevens v. Myers, (1919), 91 Or. 114-117.

5. In determining whether the plaintiffs produced sufficient evidence in support of the charges of negligence to warrant the submission of their case to the jury, the jury is not permitted to found an inference upon an inference or base an inference upon a presumption.

Deniff v. Charles R. McCormick & Co.,  
(1922), 105 Or. 697, 704.

State v. Hembree, 54 Or. 463.

Stamm v. Wood, 86 Or. 174.

State v. Rader, 94 Or. 432, 456.

6. It is the policy of the State of Oregon to limit the recovery of damages for death resulting from negligence.

Section 380, Oregon Laws.

7. No recovery can be had in an action instituted under the Employers' Liability Law for common law negligence.

Section 380, Oregon Laws.

Graham v. Bowman-Hicks Lumber Co.,  
Decided by the District Court of the  
United States for the District of Ore-  
gon, (unreported).

## ARGUMENT

**No Evidence That Alleged Negligence Was  
Proximate Cause of Accident.**

It is appellant's contention that its motion for a directed verdict should have been sustained for the reason that no evidence was presented that the negligence alleged in the complaint was the proximate cause of the injury to Clyde C. Simpson, the deceased. If no such evidence appears in the record the case presented by the plaintiffs was insufficient to justify its submission to the jury.

No extensive citation of authorities is required in support of the proposition that the plaintiffs can recover only upon negligence charged in the complaint. This is the rule in actions at common law in the State of Oregon.

Woodward v. O. R. & N. Co., 18 Or. 289,  
293.

Knahtla v. O. S. L. Ry. Co., 21 Or. 136,  
142.

Kincaid v. O. S. L. Ry. Co., 22 Or. 35, 39.

Lieuallen v. Mosgrove, 33 Or. 282, 286.

Sullivan v. Wakefield, 59 Or. 401, 407.

Holmberg v. Jacobs, 77 Or. 246.

Bamford v. Van Emon Elevator Co., 79  
Or. 395.

The same rule controls actions brought under the Employers' Liability Act. Plaintiffs can recover only on the negligence or omissions which are charged in their complaint.

Dorn v. Clarke-Woodward Drug Co., 65 Or. 516, 520.

Schaller v. Pacific Brick Co., 70 Or. 557, 568.

Heiser v. Shasta Water Co., 71 Or. 566, 571.

McClaugherty v. Rogue River Elec. Co., 73 Or. 135, 147.

Land v. Camden Iron Works, 77 Or. 137, 150.

Wolsiffer v. Bechill, 76 Or. 516, 526.

Camenzind v. Freeland Furniture Co., 89 Or. 158, 181.

Rorvik v. North Pacific Lumber Co., 99 Or. 58.

The plaintiffs must produce evidence that the negligence charged in the amended complaint was the proximate cause of the injury for which recovery is sought in the present action. This was the rule asserted in the cases where the recovery was sought for common law negligence.

Chambers v. Everding & Farrell, (1914), 71 Or. 521, 531.

Knauff v. Highland Development Co., (1913), 68 Or. 93, 95.



Buchanan v. Lewis A. Hicks Co., (1913),  
66 Or. 503, 507.

Brown v. O.-W. R. & N. Co., (1912), 63  
Or. 396.

While the Employers' Liability Law of Oregon has imposed a higher requirement of care upon employers, the rule is that the plaintiffs' evidence must establish that the negligence complained of was the proximate cause of the injury.

**Vanderflute v. Pt. Ry. Light & Power Co.,**  
**(1922), 103 Or. 398, 404:**

“While the employers' liability law has made more stringent requirements respecting the duty of employers and has abolished the doctrine of negligence of fellow-servants in certain circumstances together with the defense of contributory negligence, it has not changed the rule that the carelessness complained of must be the proximate and not the secondary cause of the injury.”

In an earlier portion of our brief (see pages 2 to 5) we have quoted in full the two paragraphs of the amended complaint which contain the allegations of negligence. The whole charge of negligence is embodied in the following allegation set out in paragraph VI of the amended complaint:

“. . . said defendant had carelessly and negligently and in violation of Section

6785, Oregon Laws, permitted said edger and said device for lifting said dead rolls to be out of repair and in a dangerous condition in this: *that the valves admitting and releasing the steam into said cylinders for the purpose of operating said pistons to lift said dead rolls had been permitted to be and remain in such condition through some defect in the adjustment thereof which plaintiffs cannot particularly specify, but with which defendant is well acquainted, so that the same would not open and close freely, and that when the steam had been admitted into said cylinders and said rolls had been lifted, and the said valves were released for the purpose of permitting said rolls to drop upon lumber being cut in said edger, the said valves would not promptly release the steam from said pistons and said rolls were thereby kept partially or completely lifted and were prevented from descending on said lumber with sufficient force to hold the same firmly in position."*

Under the authorities discussed hereinabove the plaintiffs must produce evidence to the effect that the negligence which is alleged in the amended complaint is the direct and proximate cause of the injury. In the absence of such evidence the case should be withdrawn from the jury.

The plaintiffs produced but one witness who saw the accident to Simpson. The testimony of

this witness as to the action of the dead rolls at the time of the accident is nowhere controverted in the record. Fred Nye was the eye-witness of the accident produced by the plaintiffs and he testified as to the manner in which the accident occurred. For the convenience of the court in reviewing the testimony of this witness we deem it advisable to quote all the testimony of the witness Nye pertaining to the occurrences at the time of the accident to Simpson:

### Testimony of Mr. Nye.

Q. Now then Mr. Nye, these rolls over here, are they stationary, these top rolls that you have said are dead rolls, or can they be swung up and down?

A. These top rolls?

Q. Yes.

A. They can be lifted up by steam lever or throttle he has there.

Q. The edger man has a throttle?

A. Has a throttle; he raises these rolls up when he puts a timber in.

Q. Overhead is what in relation to the steam?

A. Steam pipes.

Q. Over the top, what is up there, on each side? Is there a cylinder up there?

A. There is, yes.

Q. Where is the valve connected with that cylinder, do you know?

A. Right on top, right closer to the top.

Q. What operates that valve?

A. Steam does.

Q. *Who has control of the valve and opens and closes it?*

A. *The edger man.*

Q. *What happens when he operates that valve? What happens to these rolls?*

A. *When he lifts up on it that throws the—when he lifts up on it that throws them open.*

Q. *That lifts these rolls up?*

A. *Yes.*

Q. In other words they hinge up, possibly like that?

A. It is hinged right in here; this top is square above it—square across. Make it square across the top.

Q. And these hinges are down like that?

A. Something.

Q. And they are hinged so these rolls can be raised up?

A. Hinged right in here; don't come clear to the top.

Q. Don't come clear to the top?

A. No, don't open to the top.

Q. Something more like that?

A. They are hinged right in here.

Q. Now when he operates this steam valve how high can these rolls be lifted up above the live rolls below them?

A. They raise about twelve inches.

Q. Now this first roll that the lumber first strikes is a driver roll or corrugated roll, isn't it? A. Yes.

Q. And when the lumber comes out of the machine, what kind of a roll is that?

A. They are driven rolls.

Q. Is it any different from the one on the other side?

A. Yes, it is different; it is a solid table there.

Q. No, this first roll comes here.

A. That is from the edger.

Q. This edger roll, what kind of a roll is that?

A. That is corrugated also.

Q. Is that the same as the roll on the other side?

A. The same.

Q. Is it driven? A. Yes.

Q. As the board runs through there in which direction do these two rolls move? Which way do they roll?

A. They are moving forwards, towards you.

Q. So as to drive the board through the machine? A. Yes.

Q. When the board that we have referred to a while ago that came in on the conveyor rolls along here is shunted over on to these dead rolls, what does the edger man do to it to cut it into pieces; what happens next?

A. He has the saws set. As soon as he sees the timber coming, he has his saws set, knows what to cut them; he sets his saws so far apart, just as far as according to the figures he is cutting.

Q. After he gets his saws set and the lumber is lined up and laying there, what does he do to it?

A. Why, he steps on his pedal and sends it into the edger.

Q. That lifts these live rolls on the foot lever here and moves it up to this next live roll?

A. He lifts up his rolls; the edger steps on it until it catches hold the end of it and it goes on in.

Q. He operates this steam valve and raises this roll up and with these rolls, runs it in between them?

A. Yes.

Q. Then what does he do when it gets in there, the end of it?

A. He doesn't have anything to do then.

Q. So far you have just lifted this roll high up in the air.

A. They both raise at the same time, these here.

Q. *Does he lower this roll on the board?*

A. *It lowers itself. He just raises up and it goes down.*

Q. *Then this rests on the board?*

A. Yes.

Q. *And binds it down against this live roll?* A. Yes.

Q. Where does the board go then?

A. The board is supposed to go on through; generally does.

Q. And what happens to it? Comes on through out here?

A. Sawed in different dimensions.

Q. According to the set of the saws?

A. Yes.

Q. Where was your station?

A. My station was way back in the end here between—there was one roll out and space enough for me to stand in there.

Q. How far were you from the edger?

A. I was about thirty feet from the edger.

Q. What was your task back there where you stood?

A. Push the edgings off where the edger tailer—

Q. In other words, you were to get the lumber away from there? A. Yes.

Q. After it was cut. Of these three men, the liner-up down here, the edger man and you down here—the tailer edger man, who was superior; who was in charge of the machine there?

Mr. KING: I object. That has nothing to do with the allegations of this case.

COURT: I think it is proper to show the circumstances; no claim I believe.



Mr. KING: If it is just explanatory. You don't claim anything else for it, do you?

Mr. MOULTON: Well, I have a position in this case which I have already urged but which is not here; for the present I reserve my right to apply it to whatever it may be applicable, but I still think it is important as part of the situation here.

Mr. KING: For the purpose of the record, I would like to make an objection to that question on the ground that it is immaterial and irrelevant and not pertinent to any issue in this case, and may I save an exception to your Honor's ruling.

COURT: Very well. I think it is competent to describe the situation there.

Q. Will you just answer that; who was the man in charge out there?

Mr. KING: Same objection.

A. The man in charge of the machine is the superior officer.

Q. What is his title? A. Edger man.

Q. Who directs and controls the machinery up on one side, and the tailer edger on the other?

A. He is supposed to direct both men, the liner-up man and the tailer.

Mr. KING: It is understood my objection goes to all this.

COURT: Yes, I understand.

Q. Now you had been working there had you, right straight along for several weeks?

A. Several weeks.

Q. In that period of time, Mr. Nye, that you had been working there at this machine and before Simpson was hurt, how had this machine been working in respect to the readiness with which these rolls responded to the valves—raised up and came down?

Mr. KING: Object to the form of the question as leading, and also object as not competent evidence for any issue in this case.

COURT: I understand the charge of negligence here is that the apparatus was out of order, the valves were out of order.

Mr. KING: Object to the form of the question.

Q. Will you just answer, Mr. Nye, in regard to that?

A. It was out of order.

COURT: State how it operated.

Mr. KING: Move to strike out his conclusion.

COURT: Not your opinion of it.

Q. Tell how it responded and what it did.

A. When he was handling that lever, why it didn't press down on the timber hard enough; it didn't give the right pressure on the timber we were sawing.

Q. Would the boards come through without stopping—come right straight through?

A. Not always; sometimes they did, and sometimes they didn't.

Q. How often did they buckle and stop?

A. Pretty often at that time.

Q. Now do you know just how near he could close the two together at that time?

A. Couldn't come closer than two inches, that is without pressure.

Q. Couldn't come without pressure closer than two inches?

A. No.

Q. What about the manner in which the rolls close on a thin board, boards an inch thick?

A. Didn't have much pressure on an inch thick.

Q. How did it work in sawing boards an inch thick? What experience did you have with it here in regard to whether it would take hold of them firmly and drive them through?

A. The board stopped and we had to raise it up and whack down on it with the rolls.

Q. How often did it stop and stick that way?

A. Three or four times in half a day.

Q. How long did that continue, these rolls bucking that way?

A. Oh, well, it continued for a couple of weeks.

Q. Was that condition still existing when Simpson was hurt?

A. It was.

Q. Do you know whether a report has been made to the mill foreman? Do you know?

A. No, I don't. I don't know that.

Q. Now, then, will you tell the jury what you were doing and just what happened when Simpson was hurt?

A. They were sawing an inch board, an inch cant they call them; call them all cants; and they lined it up straight and it went through there all but one board, and it didn't.

COURT: What?

A. It went through, all but one board. They sawed it in three pieces, and they all went through but one.

Q. Let's get at it, Mr. Nye. How does it come that one board was longer than another in that situation?

A. It wasn't longer, but one board stopped and the other two went on.

Q. There were three pieces sawed. One board was sawed into three pieces, and two of them came on through?

A. Yes, and the other one stayed.

Q. The other one stopped? A. Yes.

Q. Where did it get before it stopped?

A. It got to the first roll on the edger and stopped.

Q. Did it get clear past the saw?

A. Between the saws.

Q. It was in between the saws?

A. Stopped in between the saws.

Q. *What happened then when it stopped?*

A. *The rolls were raised and they looked to see what was in there.*

Q. *Who did that?*

A. *The operator, the edger man.*

Q. *Where were you standing?*

A. *I was standing in my position back there between the rolls.*

Q. *What were you looking at?*

A. *Looking right at the edger.*

Q. *What was the reason you would be looking right at the edger?*

A. *I was watching—I had to be watching the edger all the time.*

Q. *What happened when these rolls were raised?*

A. *The board went out of there.*

Q. *Just describe the force and violence with which it went out, and which way it went out.*

A. *Went straight backward, as near as I could tell. Went straight back from the edger.*

Q. How much of that board yet remained between the saws when it went out?

A. None of it.

Q. I mean before it went out, when it stopped?

A. How much of it?

Q. Yes. A. The whole board was there.

Q. I just want you to say how far forward it had gotten before it reversed and went back?

A. Just between the saws.

Q. In between the saws there? A. Yes.

Q. Where did it come from there; assume this was the board?

A. Revolved in this way. This is supposed to be the edger and line-up here. The saws revolve backwards, you know, sawing lumber.

Q. This saw is driving against the board as it comes through there?

A. Yes, and the rolls push it that way.

Q. The roll is revolving in one direction, and the saw in another? A. Yes.

Q. *Where did the board go from the time it stopped there?*

A. *When he raised the rolls in about a second, it moved over like that. When it moved one side, it went out the other.*

Q. Which way did it go?

A. Straight back. I saw Simpson jump up in the air.

Q. Was any call or warning given?

A. There wasn't.

Q. *Was there any time for any warning to be given after it stopped?*

A. *Not after he raised the rolls. Wasn't no time to give a warning.*

Q. *How long was it stopped when the operator raised the rolls?*

A. *Didn't stop I couldn't say more than a second.*

Q. *How long after he raised the rolls before the board went back?*

A. *They went just about a second.*



Q. With what speed or force did it go?

A. It went with all the force anything could give.

Q. Can you give the jury any idea whether it just rolled back?

A. No, it went out of there like a bullet out of a rifle.

Q. Could you see it?

A. No, I couldn't see it. I see the man jump in the air, and I didn't know whether he was hit or not until I walked up that way, and everybody stopped generally.

Q. Where did the board go? Where was the board and Simpson when you got there?

A. I didn't go clear back to him. They all jumped in there and picked him up, and they were carrying him out so I never saw where the board went to.

Q. You didn't see where the board did lay back there?

A. No, I didn't.

Q. Could you tell from where you stood whether the board hit Simpson?

A. I could.

Q. And it hit him?

A. I know it hit him because it knocked him out; went right in his direction.

Q. Did you go back there to see whether anything there to indicate he had been hit?

A. No, I didn't. I could see all I wanted to see from where I was at. I saw he was hurt and it made me sick and I didn't go back there.

Q. You didn't go back there to him because others were there?

A. Yes.

Q. *Now, in regard to that steam cylinder that operates that, do you know what was the reason these valves wouldn't close those rolls down?*

A. *They wasn't adjusted right. That is all I know about it.*

### CROSS EXAMINATION.

Questions by Mr. KING:

I want to get some of these matters clear here. I don't want to put you in the light of being misunderstood before the jury. About the last answer that you gave, you say the valves weren't adjusted right. That is just your own notion, isn't it?

A. *That is what everybody said. I saw them working on them afterwards.*

Q. *What I want to get at: You are just like any of the rest of us, you were told about the condition of the valves, and that is the basis on which you draw your conclusions that they were not adjusted right. Is that true?*

A. *Yes, sir.*

Mr. KING: *If your Honor please, at this time I move to strike out the testimony of the witness with respect to the condition of the valves from the record.*

COURT: *It will be eliminated. (Bill of Exceptions, p. 12-21. Transcript, p. —.)*

\* \* \* \*

Q. *Now there is one point I didn't get clear. I tried to pay attention. How long did you say this piece of lumber was that was coming through the edger?*

A. *I don't believe I said.*

Q. *Maybe you didn't. I thought you didn't say. I thought I might not have paid attention.*

A. *No. I was to tell the length of the table. Nobody asked that question.*

Q. How long would you say that was?

A. About thirty foot; it wasn't long enough for me to get hold of it; it couldn't have been that long.

Q. You couldn't reach it?

A. No, I couldn't reach it.

Q. You were standing thirty feet back from that edger?

A. Yes, back here, and pretty hard to get out, about three foot deep.

Q. Mr. Nye, you spoke of the edger on one side being up three feet, or thirty-six inches, this big side edger. Now there are two little projections over here?

A. Yes.

Q. Do you want the jury to understand that they run all parts of the edger at the same time, or do they run different parts at different times?

A. All these saws run on one shaft.

Q. I know turning. Suppose this piece coming through here now. Would they also put another piece over here and have it go through?

A. At the same time, yes.

Q. Have it go through at the same time?

A. Yes.

Q. They were not doing that at the time Mr. Simpson was injured. Was just this one big slab going through?

A. Just this one inch board.

Q. Just this big side edger was running at the time he was hurt?

A. Just this one side. (Bill of Exceptions, pp. 27-29; Transcript, p. —.)

\* \* \* \*

Q. Now, Mr. Nye, as I understand, this cant that was being sawed at the time of the injury to Mr. Simpson, was one inch?

A. Was one inch.

Q. Thick. About thirty inches wide and thirty feet long. Is that right?

A. That is right.

Q. And was being sawed into three separate pieces at one operation as it came through this edger, came through the edger and went on through, being sawed into three pieces; here is where it comes on the rolls up here. You say you saw Mr. Simpson line that up, did you?

A. Yes, sir.

Q. You were watching him at the time; is that right?

A. I watched him, yes.

Q. And he lined it up by raising up these rolls, did he? The sunken rolls here, the live ones?

A. No, he had nothing to do with these rolls, these chains here that held them up and held the lumber down.

Q. After the lumber was lined up, you say Pete raised up the live rolls to bring it to the edger here. Did you see him do that?

A. I couldn't see him step on the pedals there; they were at the side, but he shifted the edger; it went in the edger all right.

Q. Were you watching him? A. Yes.

Q. How much could you see of Pete at that time?

A. I could see more than his head and shoulders.

Q. How much more could you see?

A. Four or five inches more.

Q. Around up here? A. Yes.

Q. *You could see both hands, could you?*

A. *I could see his hand as he handled the lever.*

Q. How high would he put his hand up?  
Just show about what position?

A. Just like this.

Q. Just like this?

A. Don't take much strength to do it.

Q. It doesn't?

A. No, a finger will do it.

Q. *And he lifted it up?*

A. *Yes, just put the steam in.*

Q. *And when he lets go of it, the rolls come right down. Is that right?* A. *Yes.*

Q. *The rolls come down slowly, do they, or how do they come?*

A. *They come down fast. You give it release, you know.*

Q. Have you had enough experience there that you could judge the weight of these dead rolls, how many hundred pounds it would weigh, the roll on each side?

A. I don't think would weigh more than 200 pounds.

Q. Apiece? A. Apiece.

Q. That is your best judgment of them?

A. That is my best judgment.

Q. Now of course you never made any study of edgers?

A. No.

Q. They might weigh five hundred pounds, as far as you know?

A. I am sure they wouldn't weigh that.

Q. Aren't they solid?

A. No, I don't think they are.

Q. Anyway pretty heavy; you are sure they won't weigh that much?

A. Yes, sir.

Q. You have never seen one of these valves apart?

A. No, sir.

Q. Never saw the inside of it? A. No.

Q. *When the lumber went in—the lumber is lined up, that piece Simpson put on there to be sawed; Pete Matesco brought up these rolls and brought it up to the edger, and then lifted up this dead roll and started off with the saw?* A. Yes, sir.



Q. *Then the dead roll was dropped on top of it, is that right?*

A. *That is right.*

Q. Then it started through and kept on going through and of course when it came out this other side that dead roll would be on top of it too, wouldn't it?

A. It would if pressed down hard enough.

Q. And came out on the other side and came clear out here; you say two of the three pieces stayed on the other side?

A. They did.

Q. Then the third piece that they were cutting it into stopped, did it?

A. Just far enough so I couldn't get hold of it. I might have pulled it.

Q. You couldn't reach it? A. No.

Q. *You say it stopped?* A. Yes.

Q. *Did you yell at anybody when it stopped?* A. No.

Q. *Did it come to a distinct stop?*

A. *It did.*

Q. *Still, was it, for a second?* A. *Yes.*

Q. *Then you say Pete, who was standing here on this side, lifted up the dead roll and looked under there to see what was the matter?*

A. *He did.*

Q. *Did the dead rolls both lift up in the air?* A. *They did.*

Q. *After they both lifted up in the air and were up above here away from the piece, this third piece shot right back through here and went out, and went on over and struck Mr. Simpson?*

A. *It did.*

Q. *You saw it hit him?* A. *I did.*

Q. *Now when Pete Patesco lifted up the dead roll on the side where you were, how many inches did he lift it up?*

A. *Lifted clear to the top.*

Q. *Lifted the full twelve inch space you said?*

A. *Yes, sir.*

Q. *Did both of the dead rolls raise up and lower at the same time? The same lever makes them both raise up and both fall?*

A. *They do.*

Q. *It takes steam. It takes the letting in of steam to raise them up?* A. *Yes.*

Q. *When you let go the lever they drop; the steam comes out?* A. *Yes.*

Q. Now while this piece was going through the edger, the one that was in the edger at the time of the accident to Mr. Simpson, you didn't have anything to do at that time, did you?

A. When it was going through the edger?

Q. Yes. You wouldn't have any duties then, would you? A. No.

Q. It is only after the piece has arrived on the other side that you have to do anything taking it away, is that right?

A. As soon as it comes down to me. I wasn't supposed to go to the tables.

Q. I do not intend to criticize you at all. I was just asking for information. I wanted to know. I want to know about operating the edger. I want to know while the edger is at work, the piece coming through, do you have anything to do at that particular time?

A. I do, sometimes.

Q. But on this particular occasion you didn't, is that right?

A. I didn't, no.

Q. Do you remember what piece was sawed just ahead of this one? A. No.

Q. Whatever that was, you had put that away, had you? A. Yes.

Q. And now the table on which these pieces lay after they came through the edger, that is on the same level as the rolls which feed the edger is on, same distance from the floor, isn't it?

A. Same distance—yes, the rolls that raise up, they are about the same level.

Q. Yes, that is what I mean. He raises up these live rolls and that carries to the edger and it goes through the edger and comes to the table on the rolls there; they come on the same level as the live rolls which raise up? A. Yes.

Q. By "he" I refer to the edger, Pete Matesco? A. Yes. (Bill of Exceptions, pp. 36-41; Transcript, p. —.)

\* \* \* \*

Q. Suppose no lumber in there at all, in the edger machine; do you want the jury to understand that this dead roll would be up in the air and not touching the live roll?

A. Yes, it would be up—it was that way so it would be up some space; bound to be a little.

Q. *Why bound to be a little?*

A. *Because they couldn't saw anything less than one inch, wouldn't come clear together—half inch apart—it ought to be that way.*

Q. What would hold it up in the air, what force would hold it up in the air if there was no steam on and no timber in there?

A. There wouldn't be no holding up in the air if didn't have no steam.

Q. That is what I said; it would rest right down on the live roll down below, wouldn't it?

A. Rest down.

Q. Come clear down and touch the live roll, wouldn't it?

A. It would.

JUROR: You don't mean that, do you?

COURT: What did you mean a short time ago when you said the dead roll would not come within two inches of the live roll?

A. It wouldn't when the steam was on, when they were working it there.

COURT: When the steam was on?

A. Yes.

COURT: What was the steam on for, to raise it or lower it?

A. The steam was there to raise or lower it.

COURT: The steam was used all the time?

A. Used all the time. I never saw it when wasn't steam there.

COURT: I thought the way you testified that they left the steam in to raise the roll, raise it up, then shut the steam off and the rolls came down of their own weight.

A. A double valve, works up and down both.

Q. Always steam there?

A. Always steam there.

Q. Mr. Nye, that raises another question. I thought you said you had never seen the inside of one of these valves.

A. That has been explained to me.

Q. I mean, you don't know of your own knowledge what it does, do you?

A. No.

Q. That is right?

A. That is right. I don't know, but been explained to me that way.

Q. Let me repeat my question. Supposing there is no timber coming through the edger so that the timber itself would not separate the rolls; there is no timber there; suppose the edgerman has let this throttle down; he is not holding it up; wouldn't that dead roll touch the live roll in front of the edger?

A. I have never seen it when it touched clear down.

Q. You have never seen it when it touched clear down? A. No.

Q. Did you ever look at it then?

A. I have.

COURT: How close would it come to the live roll?

A. Well it would be an inch and a half or two inches, as near as I can remember.

Q. Now Mr. Nye, if it were an inch and a half or two inches it would not touch a one inch piece of lumber at all, would it? Is that right?

A. Probably it would, chousing it up and down; they used to chouse it up and down, and bound to go through there you know.

Q. I will ask you, did it touch piece of timber that was going through, the piece of lumber that was going through at the time Mr. Simpson was hurt?

A. He had to give a couple of jerks, give it a jerk on this; do that, and it would pound down on it; pound it through, you know.

Q. You saw Pete Matesco you say give this lever a couple of jerks? A. Yes.

Q. You don't know why de did it?

A. Why, did it on all them that didn't go.

Q. After he got done giving it the couple of jerks, it then rested on the piece of lumber.

A. Not very solid, no.

Q. Not very hard? A. No.

Q. Could you tell by looking at it thirty feet away how hard it rested on the lumber?

A. *I could tell if it had been any space between, it wouldn't have went.*



Q. *What?*

A. *If been any space it wouldn't have went, the lumber wouldn't have went through.*

COURT: *What do you mean by space?*

A. *Space between the roller and the lumber.*

COURT: *You mean the lumber would not pass on through unless held down by the upper roller?*

A. *No, it wouldn't; that is right.*

COURT: *If the upper roller was up two inches and it was a one inch board they were sawing, it would not have gone through? Is that what I understand?*

A. *Yes.*

Q. *Now of course you couldn't see the dead roll on the other side of the edger from you?*

A. *No, I couldn't see that roll.*

Q. *But at the time that the piece was coming out on your side of the edger, on the bearing off side of the edger, the dead roll was then resting on the piece of lumber, wasn't it?*

A. *It was, as near as I could see.*

Q. Now you say it was resting some; could you tell how hard it was resting?

A. No, only judging by the timber not all coming through.

Q. In other words, it is your conclusion from the fact that one third of this slab of lumber didn't come through; it is your conclusion that the rolls didn't rest hard enough on the piece of lumber. Is that right?

A. That is the way I figure.

Q. Well now, Mr. Nye, it rested hard enough on that lumber to cause it to come all the way through but a short part of the distance, didn't it? A. Yes, it did.

COURT: Do you understand that question? Did this piece of lumber that struck Mr. Simpson come through the second roller at all?

A. No, it didn't come through the second roller.

COURT: I thought that is what you testified; but in your answer to counsel's question you implied that it did. He said two pieces went through, but the third one didn't.

Mr. KING: He meant didn't come clear through.

A. You asked me if it went past the first roller.

Q. Let's go through it again, I want it straight. Now the edgerman, Pete Matesco, raised up these live rolls? A. Yes.

Q. And it had this piece of lumber on it? A. Yes.

Q. And you brought the piece of lumber up to this first live roll and the first dead roll, did you? A. I did.

Q. Pete Matesco raised up the dead roll, did he? A. He did.

Q. Sure he raised it up?

A. I don't know whether he raised it or not, it went in there.

Q. You didn't see him raise it then. What is your recollection of that, did he raise it? I understood you to say a while ago he did raise it.

A. I said he did raise it, is what I said.

Q. Is that true? Did he raise it?

A. He did, as far as I can remember.

Q. Now it came into the saw, didn't it?

A. It came into the saw.

COURT: And he let the roller down again, did he?

A. He let the roller down; always raises it for every piece of timber.

COURT: And then lets it down again on the timber? A. Yes.

Q. So that timber started to go into the saw then, didn't it? A. Yes.

Q. That was being cut by two saws so it would make three pieces? A. Yes.

Q. And the pieces began to come out over this live roll on the other side and between the live roll and the dead roll on the other side of the edger, this side you were on, is that right? A. Yes.

Q. All three of them went through, started? A. All but one.

COURT: He said two went through, the other didn't.

A. Two went through.

Q. You mean two pieces stuck their nose out here, but one didn't?

A. All went through until got past this—all went through until got past this roll here.

Q. Let's take the end of the timber; let's take the back end of the timber that is going into the saw; where was the back end of the timber when it started in there over that last—where was it when the timber stopped and began to come back, the tail end of it?

A. The tail end of it, right there, between the saws.

Q. The tail end was in the saws?

A. Yes, and two went in, the two pieces, and this other one stayed there.

Q. *And kicked back?*

A. *And kicked back when he raised up the rolls.*

Q. *When he raised up the rolls?* A. *Yes.*

COURT: But the third piece, the one that struck Simpson, didn't go over the second roll? A. No, it didn't.

Q. Let's get that clear.

COURT: That is what he said.

JUROR: He has explained that five or six times. Two pieces went through and one stopped there and kicked back.

Q. I want to know where the back end was when that struck there?

A. Right in there.

Mr. KING: Judge Bean, this back end never reached the saws.

COURT: The one going towards the saws or away from the saws?

Mr. KING: I call it the tail end, the last piece. The one that kicked back was in that position. Is that right? A. Yes.

COURT: It had gone through the roller?

A. That is the way I understood the question.

COURT: You have been testifying, as I understand you, that the third piece never went through the second roll at all, never went into the second roll.

JUROR: All went through.

A. Let me explain that. The timber went through—all of it went through there, past this first roller, the two pieces went on and the other piece stayed between these two.

COURT: The rear end of it.

A. The rear end of it, yes.

COURT: And kicked back this way?

A. Yes.

JUROR: *The facts of the case are that the saw had to cut the full three pieces before the two could go on and one stay there; it certainly was cut, you say?* A. *Yes.*

Mr. KING: *It was cut at the time it stopped?* A. *It was.*

Q. *Clear cut?* A. *Yes.*

Q. *Now let's get that straight. The slab had been clear cut at the time this one piece stopped. It was all cut into three pieces, is that right?* A. *Yes, that is right.*

Q. *In some way or other the roll was raised and two pieces went out at your end of the edger, the other piece, after Matesco raised the roll, that went clear back in through there?*

A. *Came clear back through.*

Q. *Through this other roller, and went clear back out through the end. Is that right?* A. *That is right.*

COURT: I understand now. I couldn't see how the saw could throw it back if it had passed there.

Mr. KING: I had some difficulty.

Q. Take this stick and assume that it is the width of that piece thirty feet long and thirty inches wide, and show where the piece

was at the time the two pieces fell off and the other piece stopped; just shoved through; the machine was there, and shoved through.

A. Run just to the end of the saw.

Q. Started in here, in under these rolls here, and began to come through coming in between these two, came on through, came on through and got clear through the saw?

A. No, no. Not through the saw; to the edge of the saw.

Q. And then two pieces of it went on through these other rolls?

A. And that one stayed there.

Q. *And after it stopped Pete Matesco raised this roll?*

A. *And the roll opened.*

Q. *And the third piece kind of swung to one side and kicked back clear through there. Is that right?* A. *That is right.*

Q. I guess I don't get that. How far is it, Mr. Nye, between the dead roll on one side of the edger, right through the saws, you know, measuring right through the saws—how far is it to the dead roller on your side of the edger?

A. About three feet through there.



Q. About three feet. Three feet you say from here to there? A. Yes.

Q. Three feet from this roll to this roll?

A. Yes.

Q. And you say the saw in there was thirty inches? A. Yes.

Q. In diameter. Now, Mr. Nye, directing your attention to this drawing, I will explain it. This represents the edger looking down on top of it, on the dead roll; that would be the dead roll on your side.

A. Yes.

Q. This would be the dead roll on the side where Simpson was working? A. Yes.

Q. And here would be the dead rolls and mingled with the live rolls, you see, in front. Now here is the chain that brings the pieces of lumber over from the conveyor, that runs along there, and here are the chains that are running it off in this direction to move the lumber back over against the pointers to line it up.

A. That is right.

Q. In other words, these chains are running that direction and these over here are always moving that direction, so if Mr.

Simpson or the operator brings the piece of lumber off the conveyor and brings it over here and over right up to the right hand side of the edger, he can still have this other chain and move back over against the pointers along there, can't he?

A. That is right.

Q. You say this piece of lumber went back so fast you couldn't see it?

A. Just saw a streak of it, couldn't see the shape of it, whether went in two pieces or three pieces. I say you could just see a streak of it.

Q. *You could see it coming out of your side of the edger? Couldn't you?* A. *Yes.*

Q. *You saw it stop?*

A. *Sure I saw it stop.*

Q. Anything else ever cause a piece of lumber coming through the edger to stop?

A. Yes, I have seen large timbers stop.

Q. Not only one inch pieces stopped, were they?

A. No, not only one inch.

Q. Large pieces stop also?

A. Yes, they were stuck, they killed the power.

Q. Sometimes they killed the power?

A. That is the only reason then.

Q. Don't larger pieces kick back sometimes when the saw strikes a twist or knot, or a splinter comes in alongside the saw and causes it to heat and bind?

A. I never seen one kick back on account of being bound though, with any force.

Q. Did you ever see any saw kick back because a splinter got down inside the edger and caused it to heat?

A. Have seen it get hot, couldn't go through.

Q. You never saw a piece kicked back that way?

A. That is right, I never did.

Q. In other words, when you worked for the McCormick people, did any pieces kick back?

A. Well I didn't see them, but I heard about a couple.

Q. And the rolls there didn't touch either, did they?

A. They were large timbers kicked back through, both large pieces.

Q. Did the rolls touch those large timbers? A. They did.

Q. What?

A. They did, but that was on account of a knot, or something.

Q. You say a knot in the piece that kicked back at the McCormick mill?

A. I didn't see it, he told me. He told me knots caused them to kick back because it would raise the roll and that would give the space.

Q. I didn't hear.

A. I say would raise the rolls in going in, and that gives a space, and they kick back.

Q. The knot would raise the rolls?

A. Sure.

Q. *Didn't that piece kick back before Pete Matesco raised the rolls?*

A. *It did not.*

Q. *What?* A. *It did not.*

Q. *You are sure of that?*

A. *I am sure of that.*

Q. This edger was the same general type of edger that was used in the McCormick mill? A. No, different.

Q. What difference?

A. It was a little heavier.

Q. A little bigger edger? A. Yes.

Q. And heavier safeguards on it too, didn't it have?

A. It did, yes.

Q. It was heavier construction throughout? A. It was.

Q. Had much heavier roll on the top of the saw—dead rolls? A. Yes, sir.

Q. Eight inch dead rolls are pretty large dead rolls? A. Yes, sir.

Q. Just one other question that occurred to me. Can you speak the name of any edger that never kicked back? A. No.

Q. What? A. No, I cannot.

(Bill of Exceptions, pp. 43-55; Transcript, p. —.)

\* \* \* \*

Q. Now, when this piece came back and struck Mr. Simpson, he was standing here where you marked "S" was he not?

A. As near as I could tell he was not.

Q. How did that piece come back? Just where did it come?

A. Comes straight back.

Q. Straight back?

A. As near as I could tell.

(Bill of Exceptions, p. 56; Transcript, p. —.)

The witness Nye states clearly in his testimony that the 30-inch board (commonly referred to by witnesses as a cant), which was being sawed at the time of the accident, was completely cut by the saws contained in the edger when it stopped. The witness was positive that it came to a distinct stop. (Brief, p. 54.) The witness further states that after the board came to a distinct stop Pete Matesco, the edgerman, raised the dead rolls and that thereupon one piece of the board, which was being cut into three pieces, shot backwards, striking Simpson and inflicting the injuries for which recovery is sought. The statement of the witness Nye that the edgerman raised the dead rolls prior to the time the lumber shot backwards are confirmed by those of the witness George, who came to the aid of Simpson. This witness states that he picked Simpson up and looked backwards at the edger. As to the position of its rolls, the witness George gave the following testimony:

Q. "And did you then as you sat there holding him, did you turn and look back at the rolls at all? A. Yes.

Q. What condition were they in, as you looked back?

A. The rolls were up.

Q. How far up?

A. I guess about six inches."

(Bill of Exceptions, p. 98; Transcript, p. —.)

\* \* \* \*

Q. "When you say the rolls were up six inches, which ones do you mean?

A. I meant the dead rolls on the edger."

(Bill of Exceptions, p. 101; Transcript, p. —.)

The negligence alleged in the amended complaint is that the valves of the edger were defective so that they would not permit the steam to escape from the cylinders promptly and let the dead rolls drop upon the lumber being cut.

The uncontradicted evidence of the witness Nye, corroborated by the testimony of the witness George, both of which witnesses were produced by the plaintiff, was that the edgerman lifted the rolls and that thereupon the lumber shot backwards. If the dead rolls were lifted by

the edgerman, it is apparent that the failure of the valves to promptly release the steam and thereby permit the rolls to fall was not a cause which contributed to the accident.

If the valves had been in proper condition the act of the edgerman in raising the dead rolls would have released the lumber from the pressure of the dead rolls and the accident would have resulted. The testimony of the witness Nye which is uncontradicted by any other testimony in the record establishes a basis for the sole inference that the negligence of the edgerman was the direct and proximate cause of the accident.

Charges were made in paragraph VI of the amended complaint that the dead rolls were kept partially or completely lifted, and were prevented from descending on the lumber with sufficient force to hold the same firmly in position and cause the same to be driven against the saws in a straight course. The only testimony upon this point is that of the witness Nye who testified that after the dead rolls had been raised by the edgerman the lumber swerved to one side and was then kicked backward by the saws. (See Brief, p. —.)

There is no evidence in the record that the piece of lumber being sawed had deviated from a straight course while being cut.



## Plaintiffs Cannot Recover for Negligence of Edgerman in Raising Dead Rolls.

No negligence on the part of the edgerman in lifting the rolls was alleged in the amended complaint. For this reason the plaintiffs cannot recover by reason of such a negligent act, even though established by the evidence. Plaintiffs can recover only upon the negligence charged in their amended complaint.

(See cases cited under Points I and Ia under Brief of Argument.)

An allegation was embodied in the original complaint to the effect that the edgerman negligently raised the dead rolls. A motion was filed by the plaintiff in error to strike such allegation from the complaint for the reason "the same consists of common law negligence for which no right of action exists in favor of the surviving widow and children". This motion was sustained by the court below.

The negligence of the edgerman is not a violation of the duties imposed in the Employers' Liability Law, Section 6785, Oregon Laws, quoted post page 71. It is a common law negligence for which a right of action vests in the personal representative of the deceased under the provisions of Section 380, Oregon Laws, which is as follows:

"When the death of a person is caused by the wrongful act or omission of another,

the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$7500, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

Graham v. Bowman-Hicks Lumber Co.,  
quoted post, page 76.

### **Jury Cannot Speculate as to the Cause of Injury.**

As we have pointed out in the earlier portion of this brief, the positive evidence of the only eye witness of the accident produced by the plaintiffs, whose testimony in this particular is not contradicted elsewhere in the record, is to the effect that the board was kicked back by reason of the negligence of the edgerman in raising the dead rolls. It is our contention that the record establishes that the negligence of the edgerman in raising the rolls was the proximate cause of the injury. We have further shown that the plaintiffs cannot recover for such negligence in the present action.

If it be assumed that the evidence does not positively establish that the act of raising the rolls was the cause of the accident, it does estab-

lish that it was a possible cause of the accident. That the act of the edgerman was a possible cause of the accident is shown by the testimony of John P. H. Reicka, an expert witness who was called by the plaintiff and who testified on cross-examination as follows:

Q. "Suppose the edgerman held up—  
lifted up the dead roll when the stick was  
stuck, would that have the same effect?"

A. That would immediately throw the  
stick out."

(Bill of Exceptions, p. 115; Transcript,  
p. —.)

The record is replete with testimony that the heating of the saws would cause the lumber to kick back.

The jury would then be required to speculate as to whether the cause of the accident was the improper condition of the valves in preventing the dead rolls from resting upon the lumber, the act of the edgerman or the heating of the saws. For the last two causes the plaintiff cannot be held responsible in the present case for such negligence is not alleged in the amended complaint. The evidence must point directly to the conclusion that the injury was caused by one of the acts of negligence charged in the amended complaint. A jury cannot speculate as to which of several possible causes was the actual cause of the injury.

Where the evidence is such that the jury is left to speculation as to the cause of the damage or injury complained of, the plaintiffs cannot recover.

**Holmberg v. Jacobs (1915), 77 Or. 246, 253:**

“Such a state of the testimony leaves the jury merely to speculate upon the actual cause of the accident, and the authorities are unanimous to the effect that a recovery cannot be made to depend upon pure speculation. The plaintiff, having assumed the burden of proof, must make her case as laid in her complaint. There is a gap both in her pleadings and her testimony between the alleged negligence and the injury of which she complains.”

**Spain v. Oregon-Washington Railroad & Navigation Co. (1915), 78 Or. 355, 369:**

Plaintiff brought this action to recover damages for being wrongfully arrested and expelled from the defendant's train and confined in a filthy jail. As an element of damages, the plaintiff alleged that he was suffering from a recently amputated arm and that by reason of his treatment and confinement in the jail, the wound was reinfected and a second amputation became necessary. The proof disclosed that the reinfection might have resulted from several causes other than the action of the defendant in eject-

ing the plaintiff from its train and causing his imprisonment. In holding that this element of damage should have been withheld from the consideration of the jury, the court stated on page 369:

“Now, from this testimony, which is wholly from plaintiff’s witnesses, there may be drawn several inferences: (1) that the inflammation which ensued upon the 21st was a mere phase of an infection already shown to exist in the wound; (2) that it arose from plaintiff’s activities around the racetrack at Boise; (3) that it came from unsterilized dressings applied by Mrs. Simms before plaintiff’s departure for Boise; or (4) that it arose from unsanitary condition existing in the jail at Huntington. There is no evidence which has a tendency to show from which of these causes the subsequent aggravated condition arose. It might have been from any one of them, or, if there exists any reason to differentiate, the first of the possible causes would seem the most probable, as there can be no question under plaintiff’s own testimony but that some infection resulting in a discharge of pus existed at the time he left for Boise. That his arm was not in an entirely satisfactory condition while at and returning from Boise is shown by his complaint, which alleges that he was ‘suffering from a recently amputated arm and was then on his way to consult his regular phy-

sician'. When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration: *Armstrong v. Town of Cosmopolis*, 32 Wash. 110 (72 Pac. 1038). So far as the wrongful arrest, detention and imprisonment, and the filthy condition of the jail, are concerned, the plaintiff made a case sufficient to go to the jury; but the court should have withdrawn from their consideration the subject of the effects of these acts upon the condition of plaintiff's arm as constituting an element in plaintiff's recovery."

***Medsker v. Portland Railway, Light & Power Co.* (1916), 81 Or. 63, 69:**

The evidence disclosed that plaintiff's intestate, a lineman, was killed as the result of a fall from a telephone pole, but did not establish whether plaintiff's intestate lost his balance, or was caused to fall by coming in contact with a charged guy wire of the defendant company. In sustaining a judgment of nonsuit, the court stated on page 69:

"This constitutes the entire testimony relating to the cause of the injury. The death was undoubtedly occasioned by the fall, but whether the descent resulted from coming in contact with the south guy wire, or was

caused by the deceased losing his balance, is problematical. In *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355 (153 Pac. 470, 475), Mr. Justice McBride, in discussing the uncertainty of such testimony observes: 'When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration.' "

**Bridenstine v. Gerlinger Motor Car Co. (1917),  
86 Or. 411, 426:**

"It is strenuously insisted that there was enough competent evidence to carry the question of Hargroves' agency to the jury. Verdicts must be supported by evidence; and they cannot stand when founded only upon supposition, speculation and conjecture. As we read the record, the most that can be said for the verdict, if the incompetent evidence is first eliminated and if it is then assumed that the verdict rests upon a finding that Hargroves was an agent of the company, is that it was founded upon speculation and conjecture: *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355, 369 (153 Pac. 470); *Parmelee v. Chicago M. & St. P. Ry. Co.*, 92 Wash. 185 (158 Pac. 977)."

*Stevens v. Myers*, (1919), 91 Or. 114, 117.

## An Inference Cannot Be Founded Upon An Inference or a Presumption.

In determining whether the praintiffs produced sufficient evidence to support the charges of negligence to warrant the submission of their case to the jury, the jury is not permitted to found an inference upon an inference or base an inference upon a presumption. This rule is firmly established in the State of Oregon.

Deniff v. Chas. R. McCormick & Co.,  
(1922), 105 Or. 697, 704.

State v. Hembree, 54 Or. 463.

Stamm v. Wood, 86 Or. 174.

State v. Rader, 94 Or. 432, 456.

If it be assumed that there is evidence in the record that the lumber being cut came to a stop and that the mere fact that the lumber stopped was the proximate cause of the accident (which we contend is not the case) the jury would be required to infer from such evidence that the lumber stopped by reason of the insufficiency of the pressure of the dead rolls upon the lumber, and not because the saws became hot. The jury would then be required to found a second inference upon the first, namely, that the rolls did not press down upon the lumber because of a defect in the valves. This second inference is required because there is no testimony in the record of any examination of the valves by any one which disclosed a defective condition at the time of the accident. Under the foregoing au-



thorities this second inference cannot be founded upon the first so as to hold the plaintiff in error liable in the present action.

It is our contention that there is no evidence in the record that the lumber being sawed moved out of a straight course towards the saws in the edger. If it be assumed that the record contains such evidence, the jury would have to infer therefrom that such deviation was caused by the fact that the dead rolls did not rest with their full weight upon the lumber. In order to hold the plaintiff in error liable, the jury would then be required to base a second inference upon the first, to-wit, that the dead rolls did not rest upon the lumber because of a defect in the valves. The verdict cannot be permitted to rest upon this second inference.

If it be contended that there is evidence in the record that the valves were out of order at some date prior to the accident and that there is a presumption that this condition continued to exist, still the jury would have to base an inference on this presumption, to-wit, that such defective condition of the valves prevented the dead rolls from resting fully upon the lumber. This as well as the foregoing instances would be a violation of the rule that a verdict cannot be supported by an inference based upon an inference, or an inference based upon a presumption. It follows that there was no competent evidence in the record to permit the submission of the case to the jury, even if assumptions of proof be made as hereinabove stated.

All of the foregoing assumptions do not take into consideration the gap between the fact that the lumber stopped, and the actual occurrence of the accident. It would be pure conjecture to permit the jury to find that accident would have occurred merely because the board stopped and if the edgerman had not raised the dead rolls. If inferences could be drawn as outlined above, still there was the intervening act of the edgerman in raising the rolls. There is no statement in the record by an expert witness or otherwise, that the lumber would have been kicked back if the dead rolls had not been raised. This, in our view, is a vital defect in plaintiffs' case, namely, the failure to prove that the alleged defect in the valves was the proximate cause of the injury.

### **Policy of the State of Oregon to Limit Recovery of Damages For Death.**

It has long been the policy of the State of Oregon to limit the recovery of damages for death resulting from negligence. The language of Section 380, Oregon Laws, which was enacted in 1862, is as follows:

“When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action had he lived, against the latter, for an injury done by the same act or omission. Such action shall be com-

menced within two years after the death, and damages therein shall not exceed \$7500 and the amount recovered, if any, shall be administered as other personal property of the deceased person.”

This statute has stood unmodified upon the statute books of the State of Oregon since the time of its enactment, except that the amount of damages recoverable was increased in 1907 from \$5000 to \$7500. It is declaratory of the policy of the state with respect to the limitation of damages recoverable for death. The cause of action for such death is vested in the administrator of the deceased person.

In 1911 the Employers' Liability Law of Oregon was enacted. The pertinent provisions of this statute with respect to the present controversy are found in Sections 6785 and 6788, which are as follows:

**Section 6785:**

“All owners, contractors, sub-contractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other mate-

rial whatsoever, shall be carefully selected and inspected and tested so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be inclosed, and all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using said electricity are

liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device without regard to the additional cost of suitable material or safety appliance and devices.”

**Section 6788 as Amended by Laws of 1921, p. 38:**

“If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or sub-contractor or any person liable under the provisions of this act, the surviving widow or husband and children and adopted children of the person so killed and, if none, then his or her lineal heirs and,

if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded; provided, that if none of the persons entitled to maintain such action reside within the State of Oregon, then the executor or administrator of such deceased person shall have the right to maintain such action for their respective benefits and in the order above named."

Under the provisions of Section 6788, Oregon Laws, quoted hereinabove, the cause of action for damages resulting from a violation of the duties imposed upon employers by Section 6785, Oregon Laws, quoted hereinabove, is vested in the surviving widow and children. The amount of damages is unlimited. It is our contention that by reason of the policy of the State of Oregon to limit the damages recoverable for death, the plaintiffs must clearly bring themselves within the provisions of the Employers' Liability Law. In other words, the cause of action does not vest in the plaintiffs unless the plaintiff in error was guilty of some violation of the Employers' Liability Law which has been alleged in the amended complaint. In our review of the evidence hereinbefore, it appears that there is evidence in the record that the edgerman was negligent in raising the dead rolls. This, however, was common law negligence for which a cause of action vested in the administrator of Clyde C. Simpson under the provisions

of Section 380, Oregon Laws, quoted *supra*, page 70. The time in which such cause of action may be commenced will not expire under the provisions of said section until two years from the date of the death of Clyde C. Simpson, which, according to the allegations of the amended complaint, occurred on October 29, 1924.

The plaintiffs were definitely advised of our contention in this respect by a motion directed to the original complaint in the present action. The original complaint contained a charge of negligence in addition to those specified in paragraph VI of the amended complaint (see page 4 of this brief), which was set out in paragraph IX thereof in the following language:

“And thereupon the operator of said gang edger who was an employe of the defendant carelessly and negligently repeatedly lifted the said dead rolls and dropped the same and released the pressure upon said lumber and permitted the same to be loose upon said power driven lower rolls.”

A motion was filed by the plaintiff in error to strike out the above allegation upon the ground “that the same consists of common law negligence for which no right of action exists in favor of the surviving widow and children.” This motion was granted by the court below, Judge Wolverton sitting.

The same rule was announced by the decision of the Hon. R. S. Bean, district judge, in a

case pending in the District Court of the United States for the District of Oregon, No. L-9526, Wanda E. Graham, plaintiff, v. Bowman-Hicks Lumber Company, defendant (unreported), in which Judge Bean gave the following opinion in sustaining a motion directed to the complaint of the widow under the Employers' Liability Act:

“This is an action to recover damages for the death of plaintiff’s husband. The complaint is long, contains numerous allegations, and a motion has been made to strike out a considerable portion of the complaint on the ground that the negligence herein alleged is a common law negligence and does not come within the provisions of the Employers’ Liability Act. That act gives the widow the right to bring an action for the death of her husband, where the employer violates or fails to observe some of the provisions or requirements of the act. But this complaint as far as I can understand it, is based wholly upon the common law negligence. It alleges that the defendant failed and neglected to provide this young man with a safe place within which to work. He lost his life by reason of the derailment of a logging train and the charges of negligence are that the company failed and neglected to properly construct its road, to properly operate the trains, to employ competent and experienced servants in operating its trains and matters of that kind, which does not come within the provisions



of the Employers' Liability Act, and if it were negligent in that respect, the right of action vests in the administrator of the estate and not the widow, and without going into detail as to the various allegations covered by the motion, it seems to me, if I have examined it carefully, that the motion is well-taken, as to the matters embraced in the motion to strike from the complaint, because they have no relation to an action under the Employers' Liability Act."

The rule asserted is that common law negligence cannot be the basis for recovery by a widow or children under the Employers' Liability Act. Although the record in the present case establishes that the edgerman was negligent in lifting the dead rolls without stopping the operation of the machinery, such negligence was common law negligence for which a right of recovery vested in the administrator. It was error on the part of the court below to submit the case to the jury and thereby permit the defendants in error (plaintiffs below) to recover a larger amount of damages than could have been recovered by them through the administrator of the estate of Clyde C. Simpson. In an action filed by the administrator the amount of damages would be limited to \$7500. It is sought in the present action to escape such limitation by inserting in the amended complaint charges of negligence consisting of the violation of the Employers' Liability Law which requires an employer to use every device, care and precaution

with respect to the safety of his machinery and to recover upon proof which establishes only common law negligence. The only proof of negligence was that of common law negligence on the part of the edgerman which under the authorities hereinbefore cited furnishes no basis for recovery in the present action.

### Conclusion.

It is earnestly submitted that the court below erred in denying the motion of the plaintiff in error for a directed verdict in its favor and in submitting the case to the jury. The proof of negligence on the part of the edgerman was not sufficient to entitle the plaintiffs to have their case submitted to the jury. There was no proof that the failure to observe the duties imposed by the Employers' Liability Law as charged in the amended complaint was the proximate cause of the accident. To permit the judgment of the court below to stand would be to nullify and restrict by judicial interpretation the policy of the State of Oregon that the damages recoverable for death from common law negligence should be limited. The error complained of was prejudicial to the rights of the plaintiff in error and the judgment of the court below should be reversed.

Respectfully submitted,

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